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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 HUYNH LE THI NGUYEN,
11 Plaintiff,

Civil No. 06-1739-AA
OPINION AND ORDER

12 vs.

13 MICHAEL J. ASTRUE,
14 Commissioner of Social Security,
15 Defendant.

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AIKEN, Judge:

STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusions." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423(d)(1)(A).

The Secretary has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502, 416.920. First the Secretary determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b).

In step two the Secretary determines whether the claimant

1 has a "medically severe impairment or combination of
2 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
3 §§ 404.1520(c), 416.920(c). If not, the claimant is not
4 disabled.

5 In step three the Secretary determines whether the
6 impairment meets or equals "one of a number of listed impairments
7 that the Secretary acknowledges are so severe as to preclude
8 substantial gainful activity." Id.; see 20 C.F.R.
9 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
10 presumed disabled; if not, the Secretary proceeds to step four.
11 Yuckert, 482 U.S. at 141.

12 In step four the Secretary determines whether the claimant
13 can still perform "past relevant work." 20 C.F.R.
14 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
15 disabled. If she cannot perform past relevant work, the burden
16 shifts to the Secretary. In step five, the Secretary must
17 establish that the claimant can perform other work. Yuckert, 482
18 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
19 (f). If the Secretary meets this burden and proves that the
20 claimant is able to perform other work which exists in the
21 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
22 416.966.

23 DISCUSSION

24 At step one of the five step sequential evaluation process
25 outlined above, the ALJ found that plaintiff had not engaged in
26 substantial gainful activity since the alleged disability onset
27 date. Tr. 36, 40, Finding 1. This finding is not in dispute.
28 At step two, the ALJ found that plaintiff had the severe

1 impairments of hypertension and depression. Tr. 36, 40, Finding
2 2. The ALJ also found that there was insufficient evidence in
3 the record to find that plaintiff had a medically determinable
4 impairment of PTSD and that her fibromyalgia, allergic rhinitis,
5 and chronic sinusitis were not severe impairments. Tr. 37. This
6 finding is in dispute to the extent that plaintiff asserts that
7 the ALJ should have found her to have additional severe
8 impairments. At step three, the ALJ found that plaintiff's
9 impairments did not meet or equal the requirements of a listed
10 impairment. Tr. 16, 18, Finding 4. This finding is in dispute.

11 The ALJ determined that plaintiff had the residual
12 functional capacity (RFC) to perform simple, routine, repetitive
13 work that did not involve more than occasional interaction with
14 co-workers and had no exertional limitations. Tr. 39, 40,
15 Finding 5. This finding is in dispute.

16 At step four, the ALJ found that plaintiff was able to
17 perform her past relevant work as a small products assembler, a
18 kitchen worker, and a street peddler. Tr. 39-40, Findings 6-7.
19 Because the ALJ found that plaintiff could perform her past
20 relevant work, she did not make a step five finding as to whether
21 plaintiff could perform other work existing in the national
22 economy.

23 ALJ's Step Four Finding

24 Plaintiff asserts that the ALJ's finding at Step 4 of the
25 disability analysis was incorrect because the ALJ relied on
26 erroneous vocational testimony. Based on the VE's testimony, the
27 ALJ identified plaintiff's past work as small products assembler,
28 kitchen worker and "street peddler." Tr. 35. At Step 1,

1 however, the ALJ found that plaintiff's part-time work as a
2 kitchen helper "appears to be less than substantial gainful
3 activity." Tr. 36. I agree. That work was done in a quasi-
4 sheltered setting (a senior citizens' center), involved no mental
5 activity, and the physical activity was sustainable only because
6 her hours were very short.

7 Regarding plaintiff's past relevant work as a street
8 peddler, relied on by both the ALJ and VE, I similarly find this
9 work does not qualify as substantial gainful employment.
10 Specifically, plaintiff was a street peddler while living in
11 Vietnam, her native homeland. Tr. 400-01. Even assuming the
12 work was performed within 15 years of the date of the hearing,
13 plaintiff earned only 50 cents per day. Further, there is no
14 evidence that she performed this work on a full-time basis.
15 Moreover, the VE was not able to testify as to the number of jobs
16 of this type available in the United States. Tr. 427. Although
17 when pressed by the ALJ as to whether there were more than 50,000
18 such jobs in the United States, the VE replied that there were.
19 Id. The VE admitted, however, that the Employment Division does
20 not track this job type and therefore, I find no evidence
21 supporting the VE's testimony. The closest the VE was able to
22 provide was DOT 2[91].457.018. Tr. 426. That category was for
23 a job titled, "Hawker; Huckster; Vendor," and described as:

24 Sells merchandise, such as fruit, vegetables, flowers,
25 or ice cream, on streets or from door to door, usually
26 using basket, pushcart, or truck to carry products.
27 May attract attention by playing chimes or chanting
28 song. May be designated according to product sold
as Ice-Cream Vendor (retail trade); Vegetable Vendor
(retail trade).

Id.

1 Plaintiff was able to perform this type of work in her
2 native land of Vietnam when she was in her early 50s. She is now
3 65 years old, living in the United States, with a very limited
4 ability to speak the English language. Tr. 119, 120, 169, 171,
5 219, 295-96, et al. The ALJ failed to include plaintiff's
6 limited English speaking ability in her hypothetical to the ALJ.
7 Therefore, I find the VE's testimony is based on an incomplete
8 hypothetical, and the ALJ's finding that plaintiff could work
9 full-time as a street peddler in the United States, was not based
10 on substantial evidence.

11 The one remaining job the VE found plaintiff qualified for
12 was that of small products assembler. Plaintiff worked as a
13 small products assembler when she first arrived in the United
14 States in 1996, until 2002. Tr. 94. This was the only job she
15 has held in the United States. There is no dispute that she
16 performed this work at substantial gainful employment levels.
17 Tr. 84. Plaintiff, however, testified that she would not now be
18 able to perform this work on a full-time basis. While the ALJ
19 generally rejected plaintiff's "allegations," the ALJ did not
20 make a credibility finding, and specifically failed to find
21 plaintiff not credible. Tr. 38. Light v. SSA, 119 F.3d 789, 793
22 (9th Cir. 1997) (hypothetical was inadequate because the ALJ failed
23 to make "specific findings justifying" his decision to discredit
24 Light's subjective complaints) (internal citation omitted).
25 Further, I find no evidence in the record to doubt plaintiff's
26 veracity that she is unable to sustain full-time work. See
27 Lester v. Chater, 81 F.3d 821, 833 (9th Cir. 1995) (in evaluating
28 whether claimant satisfies disability criteria, the Commissioner

1 must evaluate the claimant's "ability to work on a sustained
2 basis.") (internal citation omitted, emphasis added).

3 I find no evidence that plaintiff can perform any
4 substantial gainful work in the national economy. See 20 C.F.R.
5 § 404, Subpart P, Appendix 2 (Medical-Vocational Guidelines).
6 Therefore, "we need not return the case to the ALJ to make a
7 residual functional capacity determination a second time[.]"
8 Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004). The
9 Commissioner's decision is not supported by substantial evidence,
10 therefore, the decision is reversed and remanded for payment of
11 benefits.

12 CONCLUSION

13 The Commissioner's decision is not based on substantial
14 evidence. Therefore, this case is reversed and remanded for
15 payment of benefits.

16 IT IS SO ORDERED.

17 Dated this 28 day of February 2008.

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21 /s/ Ann Aiken

22 Ann Aiken
23 United States District Judge
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